

In The
Supreme Court of the United States
October Term, 1993

O'MELVENY & MEYERS,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION AS
RECEIVER FOR AMERICAN DIVERSIFIED
SAVINGS BANK, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR SHRADER & YORK,
SHRADER, YORK, CLOTE, HINDS AND GROTE, P.C.,
SHRADER, CLOTE, HINDS AND GROTE, P.C.,
WILLIAM E. YORK, WILLIAM C. SHRADER,
PAUL D. CLOTE, GARY E. GROTE AND
ELDON HINDS AS AMICI CURIAE
IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE AMICI CURIAE

This Court granted review in this case based upon representations by both Petitioner and Respondents that the Ninth Circuit's decision in *O'Melveny* conflicted with *FDIC v. Shrader & York*, 991 F.2d 216 (5th Cir. 1993), petition for cert. pending, No. 93-651. Amici Shrader &

York, et al. are respondents in *Shrader & York* and have filed a brief in opposition to the petition for writ of certiorari in that case. Their interest here is that the parties in this proceeding have broadly equated *O'Melveny* with *Shrader & York* in terms of the issue presented. These amici do not believe there is in fact any conflict because the issues presented in the two cases are significantly different. Indeed, the decision in *Shrader & York* followed longstanding Supreme Court precedent, and nothing in *O'Melveny* suggests that the Ninth Circuit intended to diverge from or to assail that precedent. However, it is unlikely at this point that the distinction will be drawn by the parties here. These amici are therefore interested that, whatever the decision in *O'Melveny* ultimately is, it address only the precise issue presented to the Court. The parties here have consented to the filing of this brief.

ARGUMENT

The parties obtained review in this Court on the basis of a conflict between the Ninth and the Fifth Circuits. These amici do not believe that the asserted conflict actually exists. *O'Melveny*, in an alternative holding, addresses whether substantive defenses, presumed good against the thrift, are nonetheless unavailable to defeat the claim after assignment to the FDIC. *Shrader & York*, a limitations case, directly addresses whether a claim was barred by limitations before it was assigned to the FDIC. The Ninth Circuit cases addressing the same limitations issue do not conflict; they agree.

O'Melveny involves no question of limitations. Instead, in an alternative holding, the Ninth Circuit stated that, when the FDIC as receiver acquires a claim, the determination of what substantive defenses can be interposed to defeat the merits of that claim is a question of federal law. *O'Melveny*, 969 F.2d at 751. Without regard to the correctness of that proposition, it is not in conflict with the Fifth Circuit's ruling on limitations and the application of state law.

Indeed, the decisions of both the Fifth and Ninth Circuits on that issue agree and are in accord with longstanding Supreme Court precedent. In *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938), this Court held that a claim, time-barred under the state law that created it, is not revived by subsequent assignment to a federal agency: The federal agency "never acquired a right free of a pre-existing infirmity, the running of limitations against its assignor, which public policy does not forbid." *Id.* at 142.

It is now "settled law" that a federal court, when presented with the question of the viability of a claim assigned to the FDIC, must determine whether, under state law, limitations expired before transfer to the agency. *FDIC v. Former Officers and Directors of Metropolitan Bank*, 884 F.2d 1304, 1309 at n.4 (9th Cir. 1989) (citing and quoting *Guaranty Trust Co.*, 304 U.S. at 126), *cert. denied sub nom, Lee v. FDIC*, 496 U.S. 936 (1990); *FDIC v. Dawson*, 4 F.3d 1303, 1309 (5th Cir. 1993)(The "issue is whether the bank would be time-barred if it tried to sue its directors in state court on the date of the FDIC's appointment as receiver."); *FDIC v. McSweeney*, 976 F.2d 532, 534 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 2440 (1993).

("The FDIC may not, however, revive claims for which the state limitations period has expired before the date of federal receivership."). Had the *O'Melveny* court been presented with the same issue, that is whether the claim was barred under state law before it was acquired by the FDIC, *Metropolitan Bank and McSweeney* would have dictated a result precisely the same as that reached by the Fifth Circuit.

CONCLUSION

None of the parties in this proceeding has suggested that this Court overrule *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938). Indeed, the limitations issue has not been raised. The parties have, however, phrased their briefing in broad terms which neither recognize nor account for the significant difference between the issue presented in *O'Melveny* and that presented in *Shrader & York*. These amici believe that the decision of this Court, whatever it may be, should not be equally broad but instead should address only that which has actually been presented here.

Respectfully submitted,

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